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A Eulogy for the EULA

*Miriam A. Cherry**

Rakoff shook his brightly dyed red hair as he shivered alongside the others waiting for the bullet train. It was a miserably cold morning, but Rakoff's fellow passengers didn't seem to mind. Most of those standing on the platform were taking their spare moments to work in the global workspace. It looked like they were talking to themselves, typing on invisible keyboards, or blinking, but in fact they were working, completing crowdsourcing tasks. Other waiting passengers were interacting with business contacts by projecting their avatars out into the virtuality. It was cold, but there was not long to wait now; smart sensors gathered a continuous stream of data about riders to re-route the trains according to where they were needed. About two minutes later, the bullet train arrived and Rakoff's implant chimed as train fare was automatically deducted from his UCoin crypto currency account.

As Rakoff's kilt brushed past the doors, terms, conditions, and limited liability provisions from the train downloaded into his implant and flitted across his vision in an exhausting and unreadable blur, leaving him dizzy and nauseated. Such a tedious, useless, and annoying waste of perfectly good computing power made him figuratively (as well as literally) ill. Multiple times per day, every minute of the day, in every city across the global village, every netizen was bombarded with legal terms that no one could negotiate, let alone understand, even if they had tried. Which they hadn't, because who would waste their time so pointlessly? Such terms were a particular source of frustration because their lengthy and cumbersome files interfaced especially poorly with the visual implant that had become so popular during the last year. Not only were these legal documents tedious and impossible to avoid seeing, but they often left implant users with a terrible headache that lasted for hours. In response to consumer complaints, companies blamed these types of headaches on bugs in the interface with the implant. Whatever the cause, ouch!

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Just last week over a sushi lunch, Rakoff's sister Margaret, an attorney, had tried to explain to Rakoff why those contractual provisions existed, giving so many people with visual implants—and even those without—headaches. She explained that all the fine print and legalese, which she called “an adhesion contract,” was an old-fashioned effort by businesses to limit their legal liability.¹ Generally, Margaret told him, the terms did not allow for negotiation—they were on a “take-it or leave-it basis.”² Most people never read them—because they were difficult to understand and it took too long, for only a tiny benefit, perhaps.

As Margaret tied back her long hair so it didn't get into the wasabi, she explained that back last century, when national governments still had more power than transnational corporations, a United States Supreme Court case had strengthened the enforceability of such adhesion contracts.³ The case involved language printed on the back of a cruise ship ticket, and the plaintiff was forced to bring suit in a port on the other side of the country based on the fine print.⁴ When the influential and business-friendly Seventh Circuit had also decided to enforce adhesion contracts against people who (today it seemed antiquated) bought software in a box, it opened the door even further for these contracts.⁵ In the 2000s, “End User License Agreement” or “EULA” contracts became quite common.⁶ These “contracts” required scrolling through terms and clicking “I AGREE.” Other websites had the terms and conditions linked on their website. Courts dithered

1. See generally Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

2. See Rakoff, *supra* note 1, at 1177.

3. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause that was part of the printed boilerplate on a cruise line ticket).

4. *Id.* at 593-95.

5. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir.1996) (where a purchaser of software ignored license terms inside the software box, the Seventh Circuit concluded that “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends) may be a means of doing business valuable to buyers and sellers alike.”); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

6. See, e.g., *Licensed Application End User License Agreement*, APPLE, <https://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/> (last visited Apr. 24, 2014).

over the next two decades about whether to enforce these so-called “shrinkwraps,” “clickwraps,” and “browsewraps.”⁷

Of course, Margaret explained, if the terms of an EULA or any other adhesion contract became so one-sided or overreaching that the terms were oppressive or constituted an unfair surprise, a doctrine called “unconscionability” protected the consumer.⁸ But those cases had to involve really outrageous conduct, like forbidding a lawsuit altogether, waiving gross negligence, requiring the customer to travel to Mongolia to bring a case, or a complete waiver of any damages.

Between bites of his favorite veggie roll, Rakoff had asked why any business would put an unenforceable term in a contract, when it was, well, unenforceable? Margaret explained that in the case of some consumers, just reading a contract provision that prevented a lawsuit or made it more difficult would be enough to put them off from bringing a lawsuit or even contacting a lawyer. Although market economics would dictate that firms would compete and the harsh terms would disappear, the opposite seemed to have happened.⁹ When one firm increased the harshness of its terms, other firms actually copied the harsh terms. And so the terms and conditions grew longer and longer and harsher and harsher on consumers. The cost savings were (mostly) not passed along to consumers but rather seemed to be kept as additional profits for the companies implementing them.

While a group of law professors, lawyers, and consumer advocates had discussed, debated, and mostly complained about one-

7. Shrinkwraps are agreements encased in plastic wrap that typically accompany software compact discs. Clickwraps and browsewraps are digital agreements. A clickwrap requires clicking agreement in some manner, such as on an “accept” box. A browsewrap is a hyperlink that is designated as an agreement by the words “Terms of Use” or similar language. NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 3 (2013). For further discussion of courts’ movement to accept these types of agreements in light of *ProCD*, see Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327 (2011).

8. U.C.C. § 2-302(1) (2012) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

9. See *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992-93 (7th Cir. 2008) (“[I]t has been hard to find decisions holding terms invalid on the ground that something is wrong with non-negotiable terms in form contracts As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.”).

sided terms and conditions and unequal bargaining power for decades,¹⁰ inertia largely carried the day. Courts and legislatures were either captured by the business lobbies or else had not seemed to think this a particularly pressing issue. Since no one thought they'd have a problem when they entered a contract or engaged in a routine, mundane transaction, such as paying a delivery drone, people still viewed these terms and conditions as largely irrelevant, or perhaps a necessary evil.

Until last year. Google Glass and the Microsoft Bracelet had satisfied the technocrati for the past decade, enabling a visual or tactile overlay and eye-click searching or touch-zooming throughout the virtuality. But just in the last year, an embedded implant promised far more speed, agility, and above all, an employment advantage. If you had an implant, steady employment and economic security were within reach. If you didn't, you might get stuck on the wrong side of the digital divide, or maybe doing random dead-end, no-benefit, poorly paid part-time work on crowdsourcing websites. Perhaps it spoke to the situation that in the last ten months alone, twenty million people had decided to try the visual implant. It was an amazing change that sped up all the innovations of the 'net and the virtuality from a generation before. Information was largely costless now and people could work, share knowledge, and connect with each other easily all around the globe. But the terms and conditions hadn't changed. No, they were as frustrating and intractable as ever as they created implant headaches for millions.

Knowing the history of the useless and annoying terms was only partially satisfactory as Rakoff stumbled onto the bullet train, still reeling from the blinding headache. He almost tripped from the after-aura left behind as he shuffled to his seat, struggling to sit down and simultaneously accommodate his kilt. It was unusual

10. See JOHN EDWARD MURRAY JR., *MURRAY ON CONTRACTS* 204 (5th ed. 2011) ("Economists, however, recognize that situation-specific monopolies created after parties of unequal bargaining power agree on a price are particularly likely to suggest inefficient terms."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1265 (2003) ("After the purchase, however, the buyers had already invested in the particular products, and returning them would have required expending additional time and effort. Although the sellers were not monopolists at the time of sale, they enjoyed a situation-specific monopoly vis-à-vis customers who had already purchased their merchandise. Of course, they could not have taken advantage of this by charging a higher price, because the price term had already been agreed upon (and paid). Unable to renegotiate price, the sellers had an incentive to try to capture benefits of their monopoly position by providing low-quality terms.").

that he had talked with Margaret about this topic . . . because Rakoff wasn't a lawyer. Oh, no. Unlike his straight-laced sister, he tended to skate on the edge of the wrong side of the law.

Now, Rakoff wasn't exactly a hacker either. No, he preferred to call himself a "disruptivist technological innovator." Okay, he'd done his share of prank hacks with friends back when he was a teenager—who hadn't? Most of them with his friend Nancy and her jet black hair hacking along with him, before she decided to follow her dad's example and started medical school. Nancy was the better hacker of the two of them, if Rakoff was entirely honest with himself. When Rakoff had hacked in his twenties, well, that was only because of a sense of outrage. Big data monitoring of bathrooms through biological sensors (even if it was the best way to figure out which bathrooms to service) was a ridiculous invasion of privacy. And then there was that "innocent" virus that ended his last employer's surveillance of workers' off-duty web activity. And ended his time there, too. But lately Rakoff had sworn off his hacktivist ways. He had promised Nancy that he'd stop. Granted, she wasn't talking to him much lately, but Rakoff was still trying to keep his word to her.

Forget thinking about Nancy, he told himself. Get productive, get back to working. Rakoff transported a holographic avatar of himself to catch up with his coding supervisor. But after only ten minutes in the global workspace, he was rudely interrupted with a shock and what was almost a blinding bolt of unpleasantness. Those damn terms and conditions from the train. Again! Glancing around the train car, about seventy percent of the passengers were wincing in pain. Rakoff seethed with annoyance. Bad enough to get a headache when first getting on the train, but now a second time too? This was unusual. What in the web was going on?

Rakoff projected several data search bots into the virtuality and had them drill down for some big data crunching. The first bot showed nothing strange.

The second bot picked up a data trail through a paid big data stream and it promised to be juicy—data from an online retailer and its executives. Well, this called for more drilling. Rakoff spent the rest of his train ride following and directing the second bot's trail through the paid data stream. There were passwords and company firewalls that impeded him, but Rakoff didn't care and didn't stop until he found it. And there it was. The e-mail exchange between the CEO of the online retailer and the compa-

ny's attorney. Turns out that the terms and conditions headache was not a "bug" at all. Rakoff gasped at what he read next.

The headache was programmed in on purpose. In fact, the headache was a deliberate feature of the terms and conditions. In an e-mail exchange that Rakoff quickly scanned, it seemed that the attorney was actually approving of his client's actions. The attorney noted that if there ever was a problem and the company needed to prove that the customers knew about the terms, they could easily prove it in court through the existence of the headaches. It looked like the actual programming of the headache had been divided up into small pieces and crowdsourced, so that none of the workers would know what was going on. Huh. So giving millions of people blinding headaches was apparently a purposeful liability avoidance strategy. Rakoff swore under his breath. Unbelievable, to cause people so much pain and then lie about its cause. He would have cursed again but it was time to get off the train.

As he jumped off, Rakoff pinged Margaret.

Luckily Margaret was free for dinner. Rakoff paid a special "privacy bar" three times the amount he'd normally spend on dinner, because he wanted a restaurant free from bugs and surveillance cameras. If you wanted privacy these days, you could have it, but it came at a price. Despite paying a drone and a leg, Rakoff swept the area carefully, for safety's sake. Shady characters and avatars flitted by him, partially cloaked. A holographic electronic New Orleans-style jazz band was playing a peppy funeral dirge in the corner. Rakoff did his sweep quickly so that he wouldn't have to endure Margaret chiding him for paying all the extra money and being paranoid at the same time.

"So. How do I do it, sis?"

"Do what?" asked Margaret.

"Stop the headaches. Stop these ridiculous terms that no one reads and everyone hates. I just want them to go away."

"Well, I've told you about that, Rakoff. The courts think it's more efficient this way.¹¹ Either the legislatures are being lobbied by businesses, or they just don't care. It's been this way so long that everyone gripes about it but no one does anything."

11. See *ProCD*, 86 F.3d at 1451 ("Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.").

“Margaret, I understand that. But it’s not sustainable anymore. They lied to us. It’s not a bug. The terms give us those headaches on purpose. For consumers, the system is broken, if it ever worked to begin with . . . which it sounds like it hasn’t since sometime in pre-industrial Britain.”

“Can’t argue with you there, Rakoff.”

“Well, what’s the issue, the loophole? How do I get it to stop?”

Margaret thought carefully before leaning in closely.

Maybe Margaret was paranoid about surveillance too, Rakoff thought. As Margaret whispered into his ear, Rakoff started to grin. Sometimes you just needed good legal advice. This was going to be great.

A week later, and Rakoff was waiting for the bullet train again. He and Margaret had read the terms and conditions for train service extremely carefully, checking and rechecking every provision.

The bullet train pulled up, and the terms and conditions download started. Rakoff stayed calm and practiced his yoga breathing exercises. Yes, this was the way to do it. As Rakoff exhaled, the terms and conditions download froze. Seventy percent of those boarding the train looked at each other, in the real world, in real time, in real surprise . . . at not being hit with a blinding headache.

Now the question, Rakoff pondered, is what would happen next? Would the train shut down, now that the terms and conditions were disabled? If the train was dead on the tracks, then Rakoff’s strategy wouldn’t have worked and he’d have to hightail it out of there and cover his tracks very carefully. Forget the breathing exercises, Rakoff was now literally holding his breath to see what would happen.

The automated announcer came on, as usual, and guided typical boarding procedures, minus the terms and conditions. Rakoff couldn’t believe his luck. The other passengers seemed strangely elated at skipping the headache-inducing download. Rakoff slowly sauntered onto the next train car, his kilt freshly ironed, and with his bouquet of hyacinths, ready to finish the train ride that would take him to his date with Nancy.

Even before the train ride was over, the crowdsourced news about the terms and conditions knock-out hit the ’net. Passengers wrote and uploaded whole reports and stories to the ’net detailing what had happened on the train. It was so unusual to not be

bombarded by terms-induced headaches that the story of the “free ride” went viral. Rakoff could trace the story spreading across the virtuality as he walked down two familiar side streets.

Not only that, but hackers across the web had also picked up the story about the headaches being deliberate, not a bug in the system.

Netizens were outraged at how many unnecessary headaches they’d had to endure. Bullet train passengers in all cities across the globe were now demanding, through their implants, an end to the terms and conditions. Since the trains could obviously run without the terms, the passengers were getting their way. Within only ten minutes, stories were trending upward about the proper way to handle terms and conditions in the new technological age.

Nancy put the hyacinths in a vase and sighed.

“Okay. I accept what you did. I think I even understand why and support your actions. Everyone is tired of those terms and who wants headaches? But what I want to know is, how did you and Margaret do it?”

Rakoff thought quickly. It was no good trying to cover things over with Nancy. She knew this had his handiwork all over it. After a year since they’d reconnected—granted, some of that on and some off—she just knew him too well for him to try to hide anything. Probably a good sign.

“Margaret and I scrutinized both the terms and conditions of the visual implant that I and most of the passengers had, and then the terms and conditions that were being downloaded from the bullet train.”

As he was about to finish his explanation, a story came across the virtuality from the crowdsourced media. They explained Rakoff’s plan better than even he could, so he sent the news link to Nancy’s bracelet.

“Ah,” she said. “Smart. So you had your visual implant jack everyone else’s and send the implants’ terms and conditions to the train at the same instant that the train was trying to download its terms and conditions to its passengers. Says here that the conflicting and inflexible contract terms caused some type of infinite loop in the train’s processing core. But because the terms were never a vital component of actually running the train, the programming could skip them and still keep the trains running. Meanwhile, because the entire crowd on the train had their visual

implants involved, you weren't implicated in the subsequent data trace. Very clever."

Rakoff nodded. "My implant had a term demanding resolution of any claims by a virtual arbitrator, and the train's terms forbade virtual arbitrators. It essentially created a 'dueling EULA' situation, which couldn't be resolved by the computers and resulted in a meltdown. Now that people know about this, the EULAs are history."

A minute later, both Rakoff and Nancy watched as groups of implant users banded together in both Tokyo and Nairobi to find the conflicts in the EULAs and to take down the terms and conditions on three crowdsourcing work websites.

The next morning, Margaret appeared as legal advisor on "Talk of the Net." She noted that adhesion contracts had not been kind to consumers, even before the 'net, the virtuality, and implants.

She analogized the "dueling EULA" situation to an old legal doctrine called the "Battle of the Forms" where old-time merchants used to send each other differing printed forms in the mail.¹² The last version that was sent was the "last shot," and it controlled the terms.¹³ Later, more complicated rules arose that compromised between the merchant forms, but even the best lawyers barely understood the rules, that was how complex they were.¹⁴ All that said, consumers never had the same kind of bargaining power or access to counsel that merchants did. Consumers didn't even have their own forms. That was, until now.

Netizens around the globe had started a crowdsourcing website to create forms. Margaret noted that people were working around the clock, from Oslo to Vanuatu, to come up with consumer-friendly forms that would, in the process, conflict with the existing forms to invalidate them temporarily. Margaret was acting as legal counsel. With technology as an equalizer, there would be a way to establish a set of default terms that would be more visible and more democratic for consumers and merchants. A system could be established that was both fair and efficient.

12. See MURRAY, *supra* note 10, at 172-73 ("Winning the 'Battle of the Forms' at Common Law – the Last Shot Principle").

13. *Id.* at 173 ("The seller 'won' the 'battle of the forms' simply because it fired the last shot in the battle.").

14. U.C.C. § 2-207 (2012); MURRAY, *supra* note 10, at 176 (explaining that the "celebrated" or "infamous" Section 2-207 was designed to remedy the possible injustice in the application of the "last shot rule").

Rakoff smiled as he watched the news and stepped onto the bullet train to head back home, with Nancy's bracelet on his arm, and without a headache.